Sprint/United Management Company *and* Jeborah Diebold. Case 17–CA–21603

August 15, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On September 30, 2002, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel relies on *Tradewaste Incineration*, 336 NLRB 902 (2001), as support for the proposition that Jeborah Diebold's e-mail message to her coworkers about the suspected presence of anthrax did not lose the protection of the Act. In *Tradewaste*, the Board found that an employee did not lose the protection of the Act despite posting notices containing incorrect perceptions regarding a new hire's pay rate. *Tradewaste* is distinguishable from this case because unlike here, the Board adopted the judge's finding that the evidence did not show that the information in the notice was deliberately or maliciously false. Id. at 907. "In a labor relations context, the phrase 'maliciously false' refers, inter alia, to a statement uttered 'with reckless disregard of whether it was true or false.'" See *Linn v. Plant Guards*, 383 U.S. 53, 61 (1966).

In agreeing that Diebold's e-mail did not constitute protected concerted activity, Chairman Battista does not pass on *Tradewaste Incineration*. Chairman Battista agrees that the statements here were intentionally false or made with reckless disregard for truth or falsity. Further, even if they were simply false, Chairman Battista may well find them unprotected. In this regard, he emphasizes the exceptional context and potentially disruptive effect of Diebold's statements regarding anthrax contamination in the workplace. These statements were transmitted to four of the Respondent's employees at a time of national alarm concerning such chemicals, in the aftermath of the September 11, 2001 terrorist attacks and subsequent anthrax-related deaths. The Respondent's adoption of a zero-tolerance policy for hoaxes or jokes pertaining to anthrax alerted employees that they must act with a heightened degree of responsibility regarding that subject.

Our concurring colleague asserts that this case involves a balancing of the Respondent's legitimate interest in preventing the spread of false information and Diebold's interest in communicating safety-related information to fellow employees. We disagree. As the judge found, Diebold spread information that was false and was uttered with reckless disregard for truth or falsity. In our view, Diebold has no legitimate interest or right to spread this information, and thus no balancing is required or warranted.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, concurring.

I agree that the Respondent acted lawfully in discharging Jeborah Diebold under its anthrax-related "zero tolerance" policy after she sent an e-mail message to four coworkers stating that anthrax had been confirmed at the Respondent's Lenexa Warehouse. I do not, however, endorse the judge's analysis of this case, woven together from various strands of law, not directly applicable to this case.

The General Counsel has not challenged the legality of the zero-tolerance policy itself. The issue for me, then, is whether the policy's application to Diebold's e-mail message unlawfully interfered with the exercise of her Section 7 right to communicate with fellow workers about a possible anthrax threat.[1] In this case, I conclude that the Respondent's interest in preventing the spread of false information and fear about anthrax contamination outweighed Diebold's interest in communicating what was false information, based entirely on an overheard conversation and her own embellishments, to coworkers who did not even work at the warehouse in question. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

This is an unusual case. The timing and context of these events cannot be ignored. Diebold's e-mail was sent on November 2, 2001, in the midst of widely publicized anthrax deaths and contamination incidents. Predictably, her message led to a chain of internal e-mail traffic across the country. Although the e-mail may not have been intended to incite fear and confusion, sending it likely would have the same effect as a deliberate hoax: unnecessary fear, even panic. In this context, I cannot say that the Respondent acted unlawfully in discharging Diebold under its zero tolerance policy.

Stanley Williams, Esq., for the General Counsel.
Donald S. Prophete, Esq., of Overland Park, Kansas, for the Respondent.
Steve Horak, Esq., of Overland Park, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Overland Park, Kansas, on August 13 and 14, 2002. At issue is whether Charging Party Jeborah Diebold, who was discharged by Respondent Sprint/United Management Company because she sent an e-mail to employees stating that

[1] There were no exceptions to the judge's finding that Diebold's actions constituted concerted activity within the meaning of the Act.

anthrax had been found in Respondent's Lenexa Warehouse, lost the protection of the Act. All parties agree that Diebold's anthrax statement was in error. Respondent claims that Diebold's action was reckless and opprobrious conduct, thus without protection from the Act, while General Counsel and Charging Party claim that Diebold's conduct was reasonable under the circumstances, and not so egregious as to lose the protection of the Act.[1]

On the entire record, including my observation of the demeanor of the witnesses,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a global communications company, headquartered in Overland Park, Kansas. During the 12-month period ending December 31, 2001, Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5,000 directly from points outside the State of Kansas. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Background

Respondent's headquarters are located in Overland Park, Kansas, which is just across the State line from Kansas City, Missouri. Respondent has more than 80,000 employees worldwide. In November, approximately 25,000 employees worked in the Kansas City metropolitan area. These employees work in various locations including a warehouse located at 11701 W. 85th Street, Lenexa, Kansas (the Lenexa Warehouse); Building One of the main Sprint campus between 115th and 119th Streets in Overland Park, Kansas, housing the consumer marketing group; and the 5454 building at 5454 West 110th Street in Overland Park, Kansas, where the materials management group is located.

Sprint Policies Regarding Anthrax Hoaxes

Following the tragic events of September 11, Respondent adopted and published through its internal electronic communication system, policies and bulletins intended to alert its employees to the dangers of biological agents and the processes to follow when the presence of such agents was suspected. Those publications were, "Play It Safe At Sprint! Handling Suspicious Mail and Packages" dated October 22; "Spring Security Awareness Alert" published on October 24, on the Sprint newswire; "Anthrax Q & A Fact Sheet" dated October 25; and "Precautions for Biological Agents" undated. Sprint's policy was to discharge any employee engaging in a hoax or joke about anthrax. One employee was discharged in late October because he put coffee creamer in an envelope and left the envelope in another employee's mail slot.

Possible Anthrax Contamination of October 31

On Wednesday, October 31, Sprint LTD[3] technicians performed work on Postal Service PBX[4] equipment at the Kansas City, Missouri Stamp Fulfillment Services Center located in an Industrial Park underground cave in eastern Jackson County, Missouri. These Sprint technicians reported from Sprint's Lenexa Warehouse. The technicians took two PBX cards from the Kansas City, Missouri Stamp Fulfillment Services Center and delivered the PBX cards to the Lenexa Warehouse. The Lenexa Warehouse ships and receives materials and equipment for Sprint's local, long distance, and cell phone divisions.

On Thursday, November 1, at about 1 a.m., the United States Postal Service notified Steven Rumple, Sprint manager of operations support, that the Sprint technicians might have been exposed to anthrax contamination on Wednesday, October 31, at the Kansas City, Missouri Stamp Fulfillment Services Center. Further, the PBX cards brought back to the Lenexa Warehouse might also be contaminated by anthrax. Four LTD technicians and one warehouse technician worked in the Lenexa Warehouse. Rumple immediately contacted Sprint Corporate Security. Corporate Security immediately sealed the Lenexa Warehouse. Sprint also notified the authorities concerning the potential anthrax contamination at the Lenexa Warehouse. Eventually, in the early morning hours of Thursday, November 1, the Lenexa Police and Fire departments and the FBI were on the scene. Samples were taken from the Lenexa Warehouse and the two PBX cards were bagged.

The Lenexa Warehouse was temporarily closed to all personnel during the period Thursday, November 1 through Monday, November 5. The Midwest Research Institute, an independent testing laboratory, conducted tests for anthrax contamination on samples and materials taken from the Lenexa Warehouse. On Sunday, November 4, the Institute reported that it found no evidence of anthrax bacteria on the materials that were tested. Nevertheless, Lenexa Warehouse technicians were seen at public health facilities and prescribed antibiotics as a prophylactic measure. None of the Lenexa Warehouse technicians were actually tested for anthrax exposure.

Danny Branson, national manager of field material operations for the business markets group, was present at the Lenexa Warehouse in the early morning of November 1, to ensure that no employees entered the building. The area manager who had direct responsibility for the Lenexa Warehouse, Tania Kilburn, was returning from a business trip on that date. Early on the morning of Friday, November 2, Branson and Kilburn spoke in Branson's office at the 5454 Building. Kilburn also works in that building. Branson informed Kilburn of the possibility that anthrax contaminated equipment had been delivered to the Lenexa Warehouse. At that time, the exact date of delivery of

[1] The charge was filed by Diebold on March 21, 2002, and amended on May 28, 2002. The complaint was issued on May 29, 2002. Unless otherwise referenced, all dates are in 2001.

[2] Credibility resolutions have been made based upon the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[3] LTD is an acronym for local telephone division.

[4] PBX is an acronym for personal branch exchange.

this equipment was thought to be October 31, but that date was being verified. Kilburn, who was pregnant at the time, concluded that if the equipment was delivered on October 31, she had not been in the Lenexa Warehouse at a time when the potentially contaminated equipment was present. Rather, she had been out of town.

Consumer Marketing Learns of Lenexa Warehouse Situation

The consumer-marketing group was not directly affected by the Lenexa Warehouse closure. No official notification regarding the Lenexa Warehouse closure was sent to the consumer-marketing group. However, on Friday, November 2, Project Manager Trina Fry received a telephone call from her daughter-in-law, Tania Kilburn, at around 9 a.m. When Fry received the phone call from Kilburn, Jeborah Diebold, a coworker, was working with Fry in Fry's cubicle. Diebold overheard some of Fry's portion of the telephone conversation with Kilburn.

Fry testified that Kilburn called to let Fry know that although there was a possibility of anthrax contamination at the Lenexa Warehouse, Kilburn did not think that she was in any danger because she had been out of town at the time. Kilburn told Fry that she might be tested for anthrax. Kilburn told Fry that she had learned of the possibility of anthrax contamination from Danny Branson, Kilburn's boss. Although Fry spoke to Kilburn via the handset rather than by speakerphone, Fry repeated the entire conversation to Diebold. Fry specifically recalled telling Diebold that the Lenexa Warehouse was being tested. Fry recalled that during the course of her conversation with Kilburn, she questioned Kilburn about what could be done in the event Kilburn had been exposed to anthrax, given the fact that Kilburn was pregnant. Both Fry and Kilburn denied that either of them stated that anthrax was confirmed at the Lenexa Warehouse. Diebold did not remain in Fry's cubicle during the entire Fry-Kilburn telephone conversation. When Fry finished her conversation with Kilburn, Fry spoke briefly with her manager, Kim McKnight, program manager IV, and also with Steve Lohr, McNight's boss. The thrust of these conversations was concern for Kilburn due to her pregnancy. Fry did not recall speaking to coworkers Denise Lamb or Ingrid Simms.

Fry testified that she was unaware of any activities performed at the Lenexa Warehouse other than storage of materials. Fry knew this because she knew that Kilburn went to the Lenexa Warehouse in order to take inventory. Specifically, Fry was unaware that the Lenexa Warehouse had anything to do with pay phones, billing operations or printing, or mailing operations. Fry denied that Kilburn ever stated that anthrax had been confirmed at the Lenexa Warehouse. Fry denied that she ever told Diebold that the Lenexa Warehouse tested positive for anthrax. Fry was unaware that the Lenexa Warehouse might be constructed as three facilities. Fry did not know that the possible contamination occurred on October 31, and she did not know that any tests came back positive. For demeanor reasons, I credit these assertions of Fry's.

Diebold, a project manager, systems analyst, testified that while she was present in Fry's cubicle on the morning of November 2, Fry received a telephone call from her daughter-in-law. Diebold recalled that she heard Fry say, "oh, my God, are you sure it is Anthrax?" Diebold began tapping Fry on her shoulder asking her, "Anthrax where?" Fry, who was still on the phone with Kilburn, pointed down toward the floor. Diebold testified, "I took that as Sprint." Diebold asked, "Sprint?" and Fry said yes. Diebold asked if it was at their building and Fry told her, "no, no, hold on, hold on." Then Fry continued her conversation with Kilburn. Diebold testified that she heard Fry ask where and when. Fry also asked Kilburn, "What about the baby? What can you do?" Then Fry asked Kilburn if she had spoken to Mickey, Kilburn's husband and Fry's son.

Diebold testified, "So, I am nudging at [Fry] again, for more details." According to Diebold, Fry paused in her conversation with Kilburn and addressed Diebold, "Anthrax was found on Wednesday night, Halloween night, and that it was at the Lenexa warehouse and that they closed the facility and they were testing the employees and putting them on antibiotics for Anthrax exposure." Diebold immediately left Fry's cubicle and went into McKnight's cubicle. Although McKnight was talking on the telephone, Diebold nudged her on the shoulder. McKnight told Diebold to "hold on a minute." Diebold, "grabbed a piece of paper . . . and jotted that Anthrax was found at Sprint." When McKnight concluded her telephone conversation, she asked Diebold where she had heard this and Diebold explained that she heard it from Fry who was speaking with her daughter-in-law about the situation. At this point, according to Diebold, Fry came into McNight's cubicle.

According to Diebold, McKnight asked Fry what happened. Fry responded, according to Diebold, that on Halloween, anthrax was found in the warehouse. Diebold testified that Fry continued her comments to McKnight as follows:

> They shut the facility down and . . . were testing the employees and offering them antibiotics and [Fry] was concerned for [Kilburn] and the unborn baby about Anthrax exposure and taking the antibiotic because they did not know, at that point, what side effects would have to an unborn child.

Diebold recalled that Fry explained to her and McKnight that Kilburn worked at the 5454 building in the material management group. As part of her duties, Kilburn traveled to the Lenexa Warehouse, where the anthrax was found. McKnight recalled that Fry said there was a threat of anthrax and tests were being performed. In any event, Diebold testified that she asked what work was performed at the Lenexa Warehouse. Fry responded that materials were stored there.

According to Diebold, in response to Fry's comment that the Lenexa Warehouse stores materials, McKnight added that bills were printed there and pay phones were built there. According to Diebold, McKnight drew a diagram of the facility and its location and the three discussed items that were printed at the Lenexa Warehouse including PCS[5] bills and internal memoranda. McKnight disagreed with Diebold's testimony. McKnight recalled asking whether either Fry or Diebold knew which Lenexa warehouse was impacted. They did not know. McKnight told them that at one of the facilities local telephone bills for the LTD are printed and distributed. McKnight did not make any representation that this was the particular warehouse

[5] PCS is an acronym for personal communications systems, commonly known as cell phones.

closed due to possible anthrax contamination nor did she make any representations about payphones in connection with any warehouse.

McKnight testified with conviction that neither she nor Fry ever told Diebold that anthrax had been confirmed in the warehouse or at any Sprint facility. McKnight testified that she never told Diebold that the place of possible contamination was the location where bills were printed or where pay phones were built. McKnight recalled describing to Diebold a warehouse in Lenexa where bills are printed but it was merely a discussion of general warehouse activity without any indication that this was the particular warehouse impacted. I credit McKnight and Fry and find that Fry actually said that a warehouse in Lenexa had been closed due to a possible anthrax contamination. Neither Fry nor McKnight claimed that bills were printed or pay phones built in this warehouse. Neither Fry nor McKnight told Diebold that anthrax was confirmed.

At this point, Fry left McKnight's office but Diebold stayed. While Diebold was in McKnight's office, according to Diebold, McKnight called both her mother and her husband to discuss family matters and in the course of these conversations, she reported to both of them that anthrax had been found at the Lenexa Warehouse and it had been closed. McKnight did not deny that she frequently calls home and it would be common for Diebold to be in her cubicle when she did so. However, McKnight did not recall discussing anthrax with her mother or her husband.

Diebold testified that she overheard the conversation between McKnight and Branson. Diebold testified that Branson told McKnight that anthrax had been found in the Lenexa Warehouse in a trashcan and on one of the printing machines. Diebold testified that she left McKnight's cubicle after this telephone conversation was completed. Neither McKnight nor Branson corroborated this testimony. Rather, they disagreed with it. I do not credit Diebold's testimony in this regard. Initially, I note that McKnight and Branson were strong, credible witnesses. Both confirmed that they did not speak on November 2, until after Diebold sent her e-mail. Second, I note that Diebold could not possibly have heard Branson's side of this telephone conversation. Finally, I note that there is absolutely nothing in the record that supports such assertions of anthrax being confirmed on November 2, in a trashcan and on a printing machine. There is, in fact, an absence of evidence regarding the existence of any printing machine in the Lenexa Warehouse.

Ingrid Simms works for Respondent in the technology services department of the consumer-marketing group. Both Diebold and Fry work nearby. Simms recalled speaking to Fry on or about November 2. Fry told Simms that her daughter-in-law said there was Anthrax in a Lenexa building where she worked and Fry was worried because her daughter-in-law was pregnant. Other employees gathered at Fry's cubicle including Denise Lamb, Diana Jones Struthers, and Beth Hood. Simms recalled that Fry said other employees were being tested but her daughter-in-law, "probably could not [be tested] because the antibodies would affect the baby."

Denise Lamb, project analyst II in consumer marketing testing, worked in close proximity to Diebold and Fry. On November 2, Fry told her that her daughter-in-law had informed her that, "they thought there was Anthrax and asked them all to leave and go to the Doctor and [Fry] was concerned because [Kilburn] told [Fry] that [Kilburn] could not take the antibiotic because she was pregnant and [Fry] was concerned about her daughter-in-law's baby, if the baby was going to be affected." Lamb thought that Fry mentioned that Kilburn worked somewhere in Lenexa and that the particular facility where Kilburn worked had been closed so everyone could go to a doctor. However, Lamb was not sure if the facility that was impacted was 5454 W. 110th Street in Overland Park or a facility in Lenexa. She just knew it was where ever Kilburn worked. Lamb did not recall a reference to tests coming back positive. Lamb recalled that Fry said that Kilburn was off for the rest of the day. Lamb recalled that Fry said that either the employees or the facility was confirmed to be contaminated. Lamb also recalled Fry saying something about bills but she could not recall specifically what was said. When Fry made these statements, according to Lamb, Diana Jones, Beth Hood, Jeanie Ballinger, and Diebold were present.

Both Simms and Lamb testified as disinterested current employees of Respondent regarding their recollection of a conversation or series of conversations, which occurred 10 months prior to the hearing. Both sincerely believed that there testimony reflected what they remembered hearing. Obviously, any discussion of possible anthrax contamination at one's place of work is highly charged and somewhat sensational. I find that both Simms' and Lambs' sincere recollections are suspect as to nuances regarding whether anthrax was found or merely suspected, whether employees were being tested, equipment was being tested, or tests had been confirmed. Diebold's recollections suffer the same deficiencies. By her own admission, Diebold interrupted Fry's conversation with Kilburn in order to obtain a few more pieces of information. Diebold's description of her actions with regard to Fry and McKnight in spreading the word about anthrax indicates that she was excited and somewhat panicked. She was not attempting a dispassionate research of events. Accordingly, I credit Diebold's testimony to this extent: I believe that she really thought she heard Fry state that anthrax was confirmed at a warehouse in Lenexa. I do not find that anyone told her this but I do find that she thought this is what she had been told.

Diebold's E-Mail

Shortly after overhearing Fry's comments to her daughter-in-law, and speaking with McKnight and other employees in the area about the situation at the Lenexa Warehouse, Diebold returned to her cubicle to prepare for a 10 a.m. conference call. At 9:53 a.m., Diebold sent an e-mail message stating that anthrax had been confirmed at the Lenexa Warehouse. The e-mail message was sent to four employees of Respondent: Mandy Diebold, Patrick Marcus, John Martiny, and Megan E. Scheetz. Diebold's e-mail and the subsequent chain of e-mail messages occurred between employees of Respondent. Diebold's e-mail stated,

> Anthrax has been confirmed in the Warehouse in Lenexa the facility has been closed. All employees are being tested. This is where bills are printed and sent as well payphones built,

there are 3 separate yet one facility. We are not clear which one was actually tested positive. This happened Wednesday evening and the test came back this morning. The material management team at 5454 is being tested due to frequent trips to the facility.

Retraction of Diebold's E-Mail

Diebold was on a conference call after sending this e-mail. Following the conference call, Diebold noted that she had received some responses to her e-mail. She also received a voice mail from someone in California asking about the e-mail. Diebold did not know the person in California and did not return the call because she could not understand the telephone number on the voice mail.

Meanwhile, in materials management, Diebold's e-mail was shown to Danny Branson. Branson, who had been working on the anthrax situation since the late of evening of October 31, was shocked when he read in the e-mail that anthrax had been confirmed. He had left clear orders that he was to be notified of any findings and he was unaware that any confirmation existed. He immediately called corporate security and was told that there was no such confirmation. Then he accessed Diebold's supervisor through a corporate directory. Branson told McKnight to have a retraction sent by Diebold immediately.

At this point, McKnight had not seen the e-mail. Branson read the e-mail to McKnight and told her the entire statement was incorrect. McKnight assured Branson that a retraction would be sent.

In any event, both Diebold and McKnight agree that shortly after noon on November 2, McKnight told Diebold she had to retract her earlier e-mail.[6] Diebold testified that she protested, stating that her e-mail was not false and was not a hoax. According to Diebold, McKnight responded that Diebold did not have any choice. Diebold testified that McKnight told her she would be fired if she did not retract the e-mail. Diebold testified that she and McKnight went to Diebold's cubicle accompanied by Sue Deterding and Kathy Gaspard, managers in the consumer-marketing group. Diebold testified that McKnight dictated a retraction, which she typed verbatim. Diebold testified that she protested that she was not sending such an e-mail because it was not true. According to Diebold, McKnight told Diebold that her job was on the line. Then, according to Diebold, McKnight hit the "spell check" button and then the "send" button.

According to McKnight, when she finished speaking with Branson, she called over the cubicle wall to see if Diebold was in her cubicle. Diebold responded that she was and McKnight went around to Diebold's cubicle. McKnight asked Diebold if she sent an e-mail regarding anthrax and Diebold responded affirmatively.[7] McKnight told Diebold that "we need to get something out, as soon as possible, saying that this information [in the original e-mail] is false." Diebold responded that she did not know what to say. McKnight stood behind Diebold, who was seated at her computer, and together they worded a retraction e-mail. According to McKnight, Diebold never said that she did not want to send a retraction. McKnight testified that neither she nor Diebold yelled or raised their voices. McKnight testified that she did not tell Diebold that her job was on the line or that she would lose her employment if she did not rescind the e-mail. McKnight testified that neither Sue Deterding nor Kathy Gaspard was present during any part of this transaction.[8]

Fry, who testified that she was present in Diebold's cubicle when the retraction was sent, did not hear McKnight make any threats to Diebold or yell at Diebold. Fry did not hear either Diebold or McKnight raise their voices. Fry did not recall Diebold objecting that her original e-mail was true. Fry recalled only that there was some urgency in getting the retraction sent and that McKnight was trying to help Diebold draft the e-mail. I credit McKnight's and Fry's version of the retraction scenario. I specifically find that McKnight did not threaten Diebold with discharge if Diebold did not send a retraction.[9] I credit McKnight's version of the retraction scenario. I specifically find that McKnight did not threaten Diebold with discharge if Diebold did not send a retraction. Accordingly, complaint allegation 4(c), which alleged that McKnight threatened discharge is a repudiation of the earlier e-mail was not sent, is dismissed.

On Friday, November 2, 2001, at 12:37 p.m., an e-mail retracting Diebold's earlier e-mail was sent to the same four employees as the initial message was sent. The retraction stated, "The information that was previously shared about a confirmed case of anthrax contamination is false. Please forward this information on to anyone else that the original email was forwarded to. This needs to done immediately."

[6] According to Diebold, McKnight also told Diebold to forward the e-mail to her adding that she would then forward the e-mail to corporate security, "and other people will see this so you need to show some kind of remorse about it." Diebold forwarded the e-mail to McKnight with the added comment, "I will never send e-mail or discuss any such topics again. I will only get bitten once and I learn." Apparently this last portion was added in response to McKnight stating that Diebold needed to show some kind of remorse about sending the original e-mail. I do not find that McKnight's direction to show some kind of remorse, even if made, was a direction not to engage in any further protected, concerted activity. Rather, it was reflective of the lack of truth in the e-mail statements. Accordingly, par. 4(b), which alleges that McKnight directed Diebold not to engage in any further protected, concerted activity for employee mutual aid and protection, is dismissed.

[7] This question is alleged as unlawful interrogation about engaging in the protected, concerted activity of alerting other employees to the possibility of their being endangered by anthrax contamination at Respondent's operations in the State of Kansas. In the context of the events surrounding this question, I do not find it interfered with employee Sec. 7 rights. The thrust of the question was not the concerted nature of Diebold's communication. Rather, it was the falsity of Diebold's communication. Moreover, the e-mail was openly authored by Diebold. Accordingly, par. 4(a) of the complaint is dismissed.

[8] McKnight explained that Sue Deterding came into McKnight's office while McKnight was speaking with Branson. Deterding had a copy of Diebold's e-mail in her hand and asked McKnight if she was aware of the e-mail. McKnight interrupted her call and told Deterding that she was taking care of the matter.

[9] Accordingly, complaint para. 4(c), which alleges that McKnight "threatened [an employee] with discharge if [she] did not disseminate to other employees a repudiation of their earlier protected, concerted statement to other employees," is dismissed.

McKnight then reported the matter up her chain of command, that is, to Steve Lohr, then Kathy McMiller, and then Mary Turner. These meetings were one-on-one between McKnight and the individuals named. Later on Friday, according to McKnight, she informed Diebold that management was taking her e-mail very seriously and was continuing to study the matter. McKnight told Diebold that anything could happen —from nothing at all to the potential for termination. The reference in the e-mail to, "we are not clear which one was actually tested positive," was completely unknown to McKnight. McKnight denied that she ever discussed treatment of the management team at the 5454 building for possible anthrax contamination.

Diebold testified that she was concerned and asked McKnight several times if she was in trouble. McKnight told Diebold, according to Diebold, that she was not in trouble because McKnight had confirmed with Danny Branson, Kilburn's superior, that "It was not a hoax."

Discharge

On Tuesday, November 6, Diebold was discharged. The decision to discharge her was made by human resources and by vice president Mary Turner. Turner testified that she determined to discharge Diebold because Respondent has a zero tolerance policy regarding anthrax hoaxes. She further testified, "I believe that a reasonable person would have taken some additional steps to try to verify the facts in the e-mail. She had a Director. We have a Security Department." McKnight and Dan Gronniger, employee relations manager, met with Diebold. Gronniger told Diebold that she was being discharged for violation of Respondent's policy regarding anthrax hoaxes as well as violation of Respondent's business communications policy which requires, in part, "clear and concise, truthful and accurate" communications. Gronniger denied that Diebold was discharged for attempting to warn her coworkers or for using company e-mail.[10]

After being discharged, Diebold called the Department of Health and spoke with someone named Denise. According to Diebold, Denise verbally confirmed that anthrax had been found at Sprint. Thereafter, Diebold saw her physician and was given Ciprocal because there was a suspicious spot on her lungs.

B. Analysis

The parties agree that many of the statements in Diebold's e-mail were not correct. However, the truth or falsity of a communication is not the determinant of whether the activity is protected. *Professional Porter & Window Cleaning Co*., 263 NLRB 136, 139 fn. 12 (1982). It is sufficient that a single employee, such as Diebold, seeks to initiate, induce, or prepare for group action regarding a term or condition of employment. *Meyers Industries*, 281 NLRB 882, 887 (1986).

Respondent argues that Diebold was not seeking to initiate, induce, or prepare for group action. Respondent notes that Diebold did not attempt to warn employees about a threat of personal exposure. I reject Respondent's argument. The object of inducing group action need not be expressed, See, e.g., *Timekeeping Systems, Inc*., 323 NLRB 244, 247–248 (1997), enfd. 742 F.2d 1438 (2d Cir. 1983). Diebold was clearly engaged in concerted activity regarding terms or condition of employment when she alerted her coworkers to possible safety problems at work.[11] Further, it was not necessary that Diebold's concerns prove objectively reasonable. "Whether the protested working condition was actually as objectionable as the employees believed it to be . . . is irrelevant to whether their concerted activity is protected by the Act." *Tamara Foods, Inc*., 258 NLRB 1307, 1308 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982), cert. denied 461 U.S. 928 (1983).

Where, as here, the conduct for which Respondent claims to have discharged an employee is the protected, concerted activity, which is alleged in the complaint, the *Wright Line*[12] analysis is inappropriate. *Neff Perkins Co*., 315 NLRB 1229 fn. 2 (1994); *Mast Advertising & Publishing*, 304 NLRB 819 (1991). Respondent discharged Diebold for sending an e-mail to her fellow employees about the presence of anthrax in Respondent's warehouse. This is the very activity, which General Counsel claims is protected by the Act. Thus, there is no dual motive to analyze. Accordingly, the analysis begins and ends with a determination of whether Diebold's actions lost the protection of the Act. See, e.g., *Felix Industries*, 331 NLRB 144, 146 (2000), enf. denied 251 F.3d 1051 (D.C. Cir. 2001).

Generally, in order to determine whether concerted activity retains the protection of the Act, it is necessary to balance the right of employees to engage in protected, concerted activities with the right of an employer to maintain order and control. See, e.g., *New Process Gear*, 249 NLRB 1102, 1109 (1980). When the conduct which leads to possible loss of protection of the Act involves a verbal outburst, the Board carefully balances the factors in *Atlantic Steel Co.*, 245 NLRB 814, 816–817 (1979), to determine whether the protection of the Act is lost. The factors are (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

The Board has sometimes utilized the term "opprobrious," in conjunction with such terms as "malicious," "defamatory," "profane," "egregious," or "offensive." For example, protected activity may become unprotected if the course of engaging in such activity, one uses sufficiently "opprobrious, profane, defamatory, or malicious language." *American Hospital Assn*.,

[10] Respondent's evidence clearly proves that Diebold was not discharged for using e-mail to communicate with her fellow employees. Rather, she was discharged because she sent an untrue e-mail regarding existence of anthrax at various Sprint facilities. Accordingly, I dismiss complaint par. 4(d), which alleges that Gronniger told Diebold that she was discharged because she engaged in protected, concerted activities for employees' mutual aid and protection.

[11] Respondent relies upon *Electronic Data Systems Corp.*, 331 NLRB 343 (2000), in which employee Eaton sent two e-mails urging employees to quit utilizing one of the company vendors. Had employees agreed, this would have led to a significant drop of service to a main customer and would have created a partial work stoppage. I find this case distinguishable from the facts herein.

[12] *Wright Line*, 251 NLRB1083 (1980), enfd., 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982).

230 NLRB 54, 56 (1977). See also *HCA/Health Services*, 316 NLRB 919 (1995) (activity can lose protection of the Act when it is "egregious, offensive, defamatory, or opprobrious").

In the representation case area, campaign propaganda material is accorded the protection of the Act unless the material is maliciously false. See, e.g., *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994). A similar standard has been utilized in the unfair labor practice area. In *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 fn. 17 (2000), the Board noted that inaccuracy or lack of merit does not defeat the Act's protection absent "deliberate falsity or maliciousness," citing *Guardian Industries Corp*., 319 NLRB 542, 549 (1993), which, in turn, relied upon *Delta Health Center*, 310 NLRB 43 (1993), enfd. 5 F.3d 1494 (5th Cir. 1993), where the employer's affirmative defense was that the statements were "maliciously false." The judge found, with Board approval, that the acts were sincere and not made "with reckless disregard for the truth." Pursuant to this standard, an employee who expressed incorrect perceptions in his memorandum regarding new hire pay rates did not lose the protection of the Act because the information was not maliciously false. *Tradewaste Incineration*, 336 NLRB 902, 910 (2001); see also, *KBO, Inc.*, 315 NLRB 570 (1994), enfd. 96 F.3d 1448 (6th Cir. 1996) (statement made with knowledge that it is false or with reckless disregard of whether it is true of false, loses protection of Act).

In *KBO, Inc*., supra, an employee told business agent Price that he had an audiotape, which proved that Respondent's, anti-union campaign was being financed from employees' profit sharing accounts. Price repeated this statement to the main employee organizer, Barnhart. Barnhart then relayed this information to two other employees who repeated the assertion to management. The Board reversed the administrative law judge's holding that Price's statement was made with reckless disregard for the truth. The Board found that,

> it is readily apparent that Barnhart . . . was simply relaying . . . in good faith what he had been told by Price, and that he reasonably believed the report to be true. Neither the fact that Barnhart had not himself heard the tape nor that the information may have been inaccurate removes Barnhart's remark from the Act's protection.

KBO, Inc., supra, 315 at 571. Thus, actual malice may be shown by knowledge of the falsity of the statement or reckless disregard for the truth or falsity of the statement. *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 962 (2000) (in context of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), defamation suit).

In reviewing these authorities, it would appear that adjectives such as "opprobrious," "egregious," "offensive," and "profane" are normally utilized in the Atlantic Steel verbal outburst area while the descriptives "malicious," "defamatory," "knowingly false," and "with reckless disregard for truth or falsity" inform the test for written material disseminated to coworkers about terms and conditions of employment. Thus when the Board referred in footnote 17 of *Senior Citizens Coordinating Council*, supra, 330 NLRB at 1105, to "deliberate falsity or maliciousness" of written disseminated materials, this standard includes "knowingly false" statements, statements made "with reckless disregard for their truth or falsity," "malicious" statements, and "defamatory" statements.

Applying this standard to the facts herein, it appears that Diebold overheard parts of conversations and based her e-mail on these bits and pieces of conversation without bothering to corroborate essential details. For instance, Diebold testified that Fry told her that anthrax was found in the Lenexa Warehouse on Halloween night; the warehouse was closed; employees and equipment are being tested. Diebold further testified that Fry told her that her daughter-in-law Kilburn worked at the 5454 building and traveled to the Lenexa Warehouse, where materials were stored, to take inventory. I credit this portion of Diebold's testimony to the extent that I believe this is what she thought she heard. I note that there were five witnesses who testified about these conversations. McKnight and Fry clearly recalled speaking and hearing only of a possibility of anthrax and that employees were being given antibiotics." Simms recalled Fry stating that there was anthrax in a Lenexa building. Lamb recalled that Fry told her, "they thought there was anthrax." Later Lamb testified that she thought Fry said either the employees or the facility was confirmed to be contaminated. Given the hearsay upon hearsay nature of these conversations, it is little wonder that the facts were distorted as the story passed from one teller to the next.

In any event, I conclude that Diebold had a mistaken basis for believing that (1) anthrax was found in the Lenexa Warehouse, (2) the Lenexa Warehouse was closed, and (3) employees and equipment were being tested. I do not necessarily consider her belief a reasonable belief, because she did nothing to independently verify the bits and pieces of information forming the basis of this belief. Nevertheless, I do not find that Diebold made these statements knowing that they were false or with reckless disregard for their truth or falsity.

Accordingly, the first three statements in the e-mail have some basis in what Diebold thought she heard: "Anthrax has been confirmed in the Warehouse in Lenexa." "The facility has been closed." "All employees are being tested."

The remainder of the e-mail lacks any factual basis. "This is where the bills are printed and sent as well payphones built, there are 3 separate yet one facility." The only thing Diebold could base this on was McKnight's description of a facility that printed bills—which might have been the Lenexa Warehouse or it might not have been the Lenexa Warehouse. There is no testimony to support Diebold's assertion that payphones are built in the Lenexa Warehouse. There is no testimony to support Diebold's e-mail assertion that the Lenexa Warehouse constitutes 3 separate yet one facility. Diebold again attributes this to McKnight. However, I credit McKnight's testimony that she described a warehouse she was familiar with—not necessary the Lenexa Warehouse. Accordingly, I find with regard to these three assertions, Diebold acted with reckless disregard for the truth or falsity of the assertions.

Diebold and Fry spoke with McKnight who told them that she did not know what the Lenexa Warehouse specifically did. Fry explained that she only knew that materials were stored there. I credit McKnight's testimony that she referenced a warehouse facility of which she was aware that also printed bills and distributed mail. I discredit Diebold's testimony that

McKnight told her that the Lenexa Warehouse was the location where bills were printed and mail distributed.

The e-mail concludes, "This happened Wednesday evening and the test came back this morning. The material management at 5454 is being tested due to frequent trips to the facility. Diebold was unable to produce any testimony to verify this portion of the e-mail. I conclude that Diebold fabricated these assertions. There is no testimony to support these assertions.

Thus, I conclude that Diebold's e-mail was sent with knowledge that some assertions were not true. This constitutes deliberate falsity. Regarding other assertions, I find that Diebold sent the e-mail without regard for the truth or falsity of these other assertions.[13] Accordingly, Diebold's actions were removed from the protection of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.

[13] Although Diebold's assertions related to terms and conditions of employment, they were, nevertheless, unsubstantiated assertions that could have ruined numerous longstanding business relationships had the e-mail escaped to the public.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.